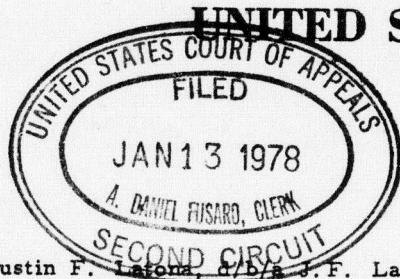


***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6200



UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

BP/S

Justin F. Latona, et al. J.F. Latona Construction Co., Inc.,

Plaintiff,

v.

G-Lam Corp., The Committee for Economic Improvement of Essex County, Inc. (CEI),
the People of the State of New York and U.S. Community Services Administration (CSA)
formerly known as U.S. Office of Economic Opportunity,

Defendants.

U.S. Community Services Administration,

Defendant-Appellee,

v.

G-Lam Corporation,

Defendant-Third-party Plaintiff-Appellant.

G-Lam Corporation,

Plaintiff,

v.

International Telephone & Telegraph Corporation, Town of North Elba, New York and
Robert Brodsky,

Defendants.

On Appeal from a Judgment of the United States District
Court for the Northern District of New York

APPENDIX

LEWIS & DeCLEMENTE
Attorneys for Defendant-
Third-party Plaintiff-Appellant
757 Third Avenue
New York, New York 10017
(212) 421-8837

PAUL V. FRENCH
United States Attorney, Northern District of New York
Federal Post Office Building
Albany, New York 12207

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JUSTIN F. LATONA, et al
Plaintiff-Appellee

vs
G-LAM CORP., et al
Defendant-Appellant

Northern District of
New York
Civil No. 76-CV-436

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

JUSTIN F. LATONA, d/b/a
J. F. LATONA CONSTRUCTION CO., INC.,

Plaintiff,

- against -

COMPLAINT

G-LAM CORPORATION, THE COMMITTEE
FOR ECONOMIC IMPROVEMENT OF ESSEX
COUNTY, INC., (CEI), THE PEOPLE OF
THE STATE OF NEW YORK and U.S.
COMMUNITY SERVICES ADMINISTRATION
(CSA) formerly known as U.S. Office
of Economic Opportunity (OEO),

Defendants.

Plaintiff, by its attorneys, McClung, Peters and Simon,
complaining of the defendants, alleges:

1. Plaintiff, Justin F. Latona, d/b/a J. F. Latona
Construction Co., Inc. is and was at all times hereinafter mentioned
a resident of Upper Montclair, County of Essex, State of New Jersey.

2. Defendant, G-Lam Corporation is and was at all times
hereinafter mentioned a New Jersey corporation duly authorized
to do business in the State of New York with an office and place
of business in the Village of Lake Placid, County of Essex and
State of New York.

3. The Committee for Economic Improvement of Essex
County, Inc., (CEI), is and was at all times hereinafter mentioned
a domestic not-for-profit corporation with its office and
principal place of business in the Village of Keyville, County
of Essex, State of New York.

4. The People of the State of New York and more

particularly, its Department of Environmental Conservation (State) is and was at all times hereinafter mentioned a duly constituted sovereign with its seat of government and principal offices in the City and County of Albany, State of New York.

5. U.S. Community Services Administration (CSA) is and was at all times hereinafter mentioned an independent agency of the United States of America, duly established by act of the Congress of the United States of America and is, upon information and belief, the successor of the U.S. Office of Economic Opportunity (OEO) and a Division of the Department of Health, Education and Welfare (HEW) of the United States of America.

6. Upon information and belief, defendant CEI entered into an agreement with defendant G-Lam under which the latter would construct a bobsled run on premises owned by defendant State of New York as the Mt. Van Hoevenberg Bobsled Run, Town of North Elba, County of Essex, State of New York, in consideration of the payment to G-Lam by CEI of certain moneys paid by defendant CSA (at that time OEO).

7. Defendant G-Lam thereafter entered into an agreement with plaintiff under which a certain portion of the work required of defendant G-Lam was subcontracted to plaintiff.

8. Thereafter defendant G-Lam and plaintiff Latona entered into and upon the premises owned by defendant State at the instance and request of defendant CEI and proceeded to perform the respective work required of them under the above noted contract and subcontract.

9. The agreed price and the reasonable value of the subcontract work to be performed by plaintiff Latona was in the

amount of \$68,000.00; there has been paid to date by defendants CEI and G-Lam to plaintiff Latona the amount of \$26,500.00, leaving a balance due and owing of \$41,500.00 less certain charges for labor and material supplied by a subcontractor, Torrington Construction Co., Inc. in the amount of \$8,680.54 which has been paid directly, less labor and materials supplied by defendant CEI in the reasonable value of \$8,099.00, leaving a balance due and owing in the amount of \$24,720.46.

10. On or about June 4, 1976 plaintiff Latona duly filed a Notice of Lien with The Comptroller of the State of New York, the Chairman of the Board of Supervisors of Essex County, the Clerk of the Board of Supervisors, Essex County, and the Chairman of the Committee for Economic Development--Essex County, and Department of Environmental Conservation, State of New York, in due form claiming the sum of \$24,720.46, together with interest, being the amount owed plaintiff Latona under the aforesaid subcontract against the interest of defendant CEI and G-Lam in moneys due or to become due relative to the contract of the above noted bobsled run which was duly and timely filed.

11. Despite due demand by plaintiff Latona, defendants CEI, CSA or OEO and G-Lam have failed to pay to plaintiff Latona the amount due to it by virtue of its supply of labor and material to the instant project.

12. Neither said lien nor plaintiff Latona's claim asserted therein has been waived or discharged in whole or in part and no proceedings have heretofore been instituted for the foreclosure or enforcement thereof.

13. On information and belief that at the time of the filing of plaintiff Latona's Notice of Lien there was due and owing from defendant CSA and/or OEO to defendant CEI and/or defendant G-Lam under the terms of the above noted grant and contract a sum in excess of any moneys claimed due by plaintiff in its Lien.

WHEREFORE, plaintiff Latona prays for judgment:

a. Adjudicating that its claim herein is a valid lien to the extent of \$24,720.46, together with interest from 9/26/75, against moneys due or to become due from defendant U.S. Community Services Administration (CSA) or U.S. Office of Economic Opportunity (OEO) to defendant The Committee for Economic Improvement of Essex County, Inc., (CEI) or defendant G-Lam Corporation relative to the contract of the Mt. Van Hoevenberg Bobsled Run, Town of North Elba, County of Essex, State of New York, owned by defendant The People of the State of New York, and directing defendant U.S. Community Services Administration (CSA) to pay over to plaintiff Latona the amount of \$24,720.46, together with interest from 9/26/75 and granting to plaintiff Latona against defendant The Committee for Economic Improvement of Essex County, Inc. (CEI) judgment for any deficiency thereon, together with the costs and disbursements of this action, and for such other, further and different relief as the Court may deem just and acceptable in the circumstances.

Yours, etc.

McCLUNG, PETERS AND SIMON
Attorneys for plaintiff Latona
41 State Street
Albany, New York 12207
(518) 462-7481

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

JUSTIN F. LATONA, d/b/a
J. F. LATONA CONSTRUCTION CO., INC.,

Plaintiff,

- against -

LIS PENDENS

G-LAM CORPORATION, THE COMMITTEE
FOR ECONOMIC IMPROVEMENT OF ESSEX
COUNTY, INC., (CEI), THE PEOPLE OF
THE STATE OF NEW YORK and U.S.
COMMUNITY SERVICES ADMINISTRATION (CSA)
formerly known as U.S. Office of Economic
Opportunity (OEO),

NOTICE OF
PENDENCY OF
LIEN FORE-
CLOSURE ACTION

Defendants.

TO: THE COMPTROLLER OF THE STATE OF NEW YORK, THE CHAIRMAN OF
THE BOARD OF SUPERVISORS OF ESSEX COUNTY, THE CLERK OF THE
BOARD OF SUPERVISORS, ESSEX COUNTY, AND THE CHAIRMAN OF THE
COMMITTEE FOR ECONOMIC DEVELOPMENT--ESSEX COUNTY, AND
DEPARTMENT OF ENVIRONMENTAL CONSERVATION, STATE OF NEW YORK:

SIRS:

PLEASE TAKE NOTICE that an action to foreclose a lien
duly filed by Justin F. Latona, d/b/a J.F. Latona Construction
Co., Inc., has been commenced against property owned by The People
of the State of New York generally known as the Mt. Van Hoevenberg
Bobsled Run, Town of North Elba, County of Essex, State of New
York, to recover the amount of \$24,720.46, together with interest
from September 26, 1975.

Yours, etc.

McCLUNG, PETERS AND SIMON
Attorneys for Plaintiff Latona
41 State Street
Albany, New York 12207
(518) 462-7481

STATE OF NEW YORK, COUNTY OF

SS.:

AFFIDAVIT OF
SERVICE BY MAIL

, being duly sworn, deposes and says: that he is over

the age of 18 years; that he served the within

upon the following attorney(s) at the following time(s) and place(s) in the following manner:

19

by depositing a true and correct copy of the same properly enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States at directed to said Attorney(s), respectively, at said address(es), respectively mentioned above, that being the address(es) within the state designated for that purpose upon the last papers served in this action or the place where the above then resided or kept offices, according to the best information which can be conveniently obtained.

Sworn to before me, this day of 19

(PRINT NAME BELOW SIGNATURE)

Notary Public—Commissioner of Deeds

STATE OF NEW YORK, COUNTY OF

SS.:

VERIFICATION

, being duly sworn, deposes and says that deponent is in the within action; that deponent has and knows the contents thereof; that

INDIVIDUAL

read the foregoing

the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

CORPORATION

the of read the foregoing

named in the within action; that deponent has and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

, being duly sworn, deposes and says that deponent is the corporation

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

(PRINT NAME BELOW SIGNATURE)

Notary Public—Commissioner of Deeds

STATE OF NEW YORK, COUNTY OF ALBANY

SS.:

ATTORNEY'S
AFFIRMATION or
CERTIFICATION

The undersigned, an attorney admitted to practice in the courts of New York State,

☐ Certification
By Attorney

certifies that the within copy has been compared by the undersigned, with the original filed

and found to be a true and complete copy thereof (pursuant to Sec. 2105 CPLR).

☒ Attorney's
Affirmation

shows: deponent is

Summons & Complaint & Notice of Pendency

plaintiff

in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by plaintiff because plaintiff is a foreign corporation

whose office and officers are not within the County of Albany where deponent has his office.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:
Correspondence and conversation with plaintiff's officers and employees and file maintained in deponent's office.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: September 24, 1976

Robert E. Simon
(PRINT NAME BELOW SIGNATURE)

McClung

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUSTIN F. LATONA, d/b/a
J.F. LATONA CONSTRUCTION CO., INC.,

Plaintiff,

- against -

G-LAM CORPORATION, THE COMMITTEE
FOR ECONOMIC IMPROVEMENT OF ESSEX
COUNTY, INC., (CEI), THE PEOPLE OF
THE STATE OF NEW YORK and U.S.
COMMUNITY SERVICES ADMINISTRATION
(CSA) formerly known as U.S. Office
of Economic Opportunity (OEO),

Defendants.

NOTICE OF REMOVAL TO
UNITED STATES DISTRICT
COURT

Civil No. 76-CV-436

HON. ALICE W. GOUGH
Clerk of Essex County
Court House
Elizabethtown, New York 12932

MC CLUNG, PETERS AND SIMON
Attorneys for Plaintiff
41 State Street
Albany, New York 12207

HON. LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Defendant, The People of the
State of New York
The Capitol
Albany, New York 12207

THE COMMITTEE FOR ECONOMIC IMPROVEMENT
OF ESSEX COUNTY, INC.
Keeseville, New York 12944

SIRS:

PLEASE TAKE NOTICE that a verified Petition For Removal
of the above-captioned civil action, to the United States District
Court for the Northern District of New York, was duly filed in the
Office of the Clerk of said District Court at Albany, New York, by

2 -

the Defendant, U.S. Community Services Administration, on the 22nd day of October, 1976. A copy of said Petition For Removal and Undertaking On Removal is attached hereto.

PLEASE TAKE FURTHER NOTICE that in accordance with Title 28, United States Code, Section 1446(e), the Supreme Court of the State of New York for the County of Essex may proceed no further in this case unless and until the case is remanded to said State Court by Order of Remand of the District Court.

Dated: October 22, 1976.

Albany, New York

JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
Attorneys for Defendant, U.S.
Community Services Administration
U.S. Post Office & Court House
Albany, New York 12207

BY Richard K. Hughes
RICHARD K. HUGHES
Assistant U.S. Attorney

Copy
U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
OCT 22 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AT O'CLOCK M.
J. R. SCULLY, Clerk
ALBANY

JUSTIN F. LATONA, d/b/a
J.F. LATONA CONSTRUCTION CO, INC.,

Plaintiff,

- against -

G-LAM CORPORATION, THE COMMITTEE
FOR ECONOMIC IMPROVEMENT OF ESSEX
COUNTY, INC., (CEI), THE PEOPLE OF
THE STATE OF NEW YORK AND U.S.
COMMUNITY SERVICES ADMINISTRATION
(CSA) formerly known as U.S. Office
of Economic Opportunity (OEO),

PETITION FOR REMOVAL
OF CIVIL ACTION TO
U.S. DISTRICT COURT

Civil No. 76-CV-436

Defendants.

Petitioner, U.S. COMMUNITY SERVICES ADMINISTRATION (CSA),
by its attorney, James M. Sullivan, Jr., United States Attorney
for the Northern District of New York, Richard K. Hughes, Assistant
United States Attorney, of Counsel, respectfully petitions the
U.S. District Court as follows:

1. That Petitioner is a named defendant in a civil action
currently pending in the New York State Supreme Court for the County
of Essex, entitled, JUSTIN F. LATONA, d/b/a J.F. CONSTRUCTION CO.,
INC., Plaintiff, against G-LAM CORPORATION, et al., Defendants,
and that no trial of said civil action has yet been had therein.

2. That upon information and belief, the above-entitled
civil action was commenced against the Petitioner herein on or
about October 6, 1976, by service of a copy of the Summons and
Complaint upon an employee of the Petitioner on that date. Copies

of all process and pleadings heretofore served upon Petitioner are attached hereto and incorporated herein as Exhibits A and B, respectively.

3. That this verified Petition For Removal is filed by Petitioner, pursuant to Title 28, United States Code, Sections 1441(a) and 1442(a)(1) on account of the fact that this state court civil action was commenced against Petitioner, a non-suable federal agency, seeking to foreclose a certain mechanics or artisans lien, which has arisen in favor of the plaintiff, a subcontractor, against the defendant, G-LAM CORPORATION, the general contractor, on account of the latter's alleged breach of a construction contract involving the construction of a bobsled run at the request of defendant, THE COMMITTEE FOR ECONOMIC IMPROVEMENT OF ESSEX COUNTY, INC., (CEI), with monetary funding allegedly provided, or to be provided, by the Petitioner.

4. That upon information and belief, the Petitioner is an agency of the Federal Government whose sole statutory function is to furnish financial assistance to public agencies or private non-profit organizations for community action programs, undertaken by these recipients, which will have a measurable, and potentially major, impact on causes of poverty in a local community, such as the project undertaken in the County of Essex, Town of North Elba, State of New York, by defendant, The Committee For Economic Improvement of Essex County, Inc., of which the plaintiff presently complains

5. That Petitioner files herewith a bond of good and sufficient surety conditioned that Petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that this case was not removable or was improperly removed.

WHEREFORE, Petitioner prays that this Petition For Removal Of Civil Action to U.S. District Court be accepted by said District Court, that this action be removed from the aforementioned state court, pursuant to the aforementioned provisions of Chapter 89 of Title 28, United States Code, that it be entered upon the civil docket of this U.S. District Court, and that upon the filing of a copy of this Petition with the Clerk of the Supreme Court of the State of New York for the County of Essex, said state court shall proceed no further unless and until the case is remanded by order of the District Court.

Dated: October 22, 1976.
Albany, New York.

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Attorney for Defendant and
Petitioner, U.S. Community Service
Administration
U.S. Post Office and Courthouse
Albany, New York 12207

BY: Richard K. Hughes

RICHARD K. HUGHES
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
DEC 5 1976 *copy*
AT 10 O'CLOCK
J. R. SCULLY, Clerk
ALBANY

JUSTIN F. LATONA, d/b/a
J.F. LATONA CONSTRUCTION CO., INC,

Plaintiff,

- against -

FEDERAL DEFENDANT'S
ANSWER

Civil No. 76-CV-436

G-LAM CORPORATION, THE COMMITTEE
FOR ECONOMIC IMPROVEMENT OF ESSEX
COUNTY, INC., (CEI), THE PEOPLE OF
THE STATE OF NEW YORK AND U.S.
COMMUNITY SERVICES ADMINISTRATION
(CSA) formerly known as U.S. Office
of Economic Opportunity (OEO),

Defendants.

The federal defendant, U.S. COMMUNITY SERVICES ADMINISTRATION (CSA), formerly known as U.S. Office of Economic Opportunity (OEO), hereinafter, CSA, by its attorney, James M. Sullivan, Jr., United States Attorney for the Northern District of New York, as and for its answer to the plaintiff's complaint herein, respectfully:

FIRST: DENIES the truth of the averments contained in paragraphs 9, 11 and 13 of the complaint.

SECOND: ADMITS the truth of the averments contained in paragraphs 3, 4 and 6 of the complaint.

THIRD: LACKS knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 1, 2, 7, 8, 10 and 12 of the complaint herein.

FOURTH: DENIES the truth of the averments contained in paragraph 5 of the Complaint herein, except admits that CSA is, and was at all times material herein, an independent agency within the executive branch of the United States of America, duly established by an Act of Congress, the Community Services Act of 1974, 42 U.S.C. Section 2941(a), the successor authority to the Office of Economic Opportunity (OEO).

- 2 -

AS AND FOR FIVE SEPARATE AND DISTINCT AFFIRMATIVE DEFENSES TO THE COMPLAINT HEREIN, THE FEDERAL DEFENDANT, BY ITS ATTORNEY, AVERS:

FIRST DEFENSE

FIFTH: That the complaint fails to state a claim upon which relief can be granted against the federal defendant, CSA.

SECOND DEFENSE

SIXTH: That the U.S. District Court lacks jurisdiction over the person of the federal defendant, CSA, and lacks jurisdiction over the subject matter of the action with respect to the federal defendant, CSA, on grounds that CSA has not been authorized by an Act of Congress, to be sued, and because this action is in effect a suit against the United States of America to which the latter has also not consented.

THIRD DEFENSE

SEVENTH: That the plaintiff has failed join an indispensable party defendant, UNITED STATES OF AMERICA, in this action.

FOURTH DEFENSE

EIGHTH: That the U.S. District Court lacks jurisdiction over the subject matter of this action under 28 U.S.C. Section 1346(a)(2), since the plaintiff's claim against the United States, if any, exceeds the sum of \$10,000.00.

FIFTH DEFENSE

NINTH: That there is an absence of privity of contract between the plaintiff and the federal defendant, CSA.

Dated: December 3, 1976
Albany, New York

JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
Northern District of New York
Attorney for Federal Defendant, CSA
U.S. Court House & Post Office
Albany, New York 12207

BY Richard K. Hughes
Richard K. Hughes
Assistant US Attorney

Ans., Counterclaim, Crossclaim & 3rd party
Claim of Deft. G-Lam Corp.

16a.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUSTIN F. LATONA, d/b/a J. F. LATONA
CONSTRUCTION CO., INC.,

Plaintiff,

-against-

G-LAM CORPORATION, THE COMMITTEE FOR
ECONOMIC IMPROVEMENT OF ESSEX COUNTY,
INC. (CEI), THE PEOPLE OF THE STATE
OF NEW YORK and U.S. COMMUNITY SERVICES
ADMINISTRATION (CSA) formerly known as
U.S. Office of Economic Opportunity (OEO),

Defendants.

ANSWER, COUNTERCLAIM
CROSSCLAIM, AND
THIRD PARTY CLAIM

Civil No. 76-CV-436

G-LAM CORPORATION,

Plaintiff,

-against-

INTERNATIONAL TELEPHONE AND TELEGRAPH
CORPORATION, and TOWN OF NORTH ELBA,
NEW YORK,

Defendants.

Defendant, G-Lam Corporation, for its Answer, denies
each and every one of the allegations set forth in the
Complaint, except as hereinafter admitted or otherwise
answered:

PARAGRAPH

1, 4, 6, 7, 8, 13

2

PLEADING

Admits

Admits G-Lam is a New Jersey
corporation.

17a

Denies that it has an office or place of business in the Village of Lake Placid, County of Essex, State of New York.

3

Admits, but lacks knowledge or information sufficient to form a belief as to the truth of the averment that CEI'S principal place of business is in Keysville.

9

Admits that Plaintiff entered into a contract with G-Lam for \$68,000 and that there has been paid to date to Latona \$26,500.

10

Admits upon information and belief.

11, 12

Lacks knowledge or information sufficient to form a belief as to the truth of the averment contained in these paragraphs.

FIRST AFFIRMATIVE DEFENSE

2. Plaintiff entered into an agreement with Defendant G-Lam subject to the terms and conditions of G-Lam's contract with CEI, and subject to payment made by CEI to G-Lam.

3. Defendant G-Lam has received no payments for the services upon which Plaintiff has commenced this action; consequently, Plaintiff is not entitled to recover from G-Lam any of the amounts sought in its Complaint.

SECOND AFFIRMATIVE DEFENSE

4. The agreement entered into between G-Lam and Latona provided that the owner had reserved the right to supply any and all equipment or manpower to the contract in lieu of

18a

services to be provided by Plaintiff, and at the rates and amounts agreed upon by G-Lam and the owner for such services, and that these amounts would be deducted from Plaintiff's contract price.

5. The owner performed certain services and supplied labor as contemplated in Plaintiff's agreement with Defendant G-Lam. These services that were performed were valued at \$19,339, a figure that was agreed upon by all interested parties.

6. As a result, from the net amount of money due and owing to Latona for the services and materials supplied by him pursuant to the aforesaid subcontract, should be deducted the sum of \$26,500 paid by G-Lam and also the sum of \$19,339 of work supplied by CEI.

7. In addition, Torrington Construction Co., Inc., which was a subcontractor of the Plaintiff, filed a lien for \$10,030.54, filed on December 2, 1975, which was settled by a direct payment by CEI to Torrington, Plaintiff's subcontractor.

8. Accordingly, the net amount due to Latona pursuant to this subcontract is no more than \$12,130.46.

COUNTERCLAIM

1. Plaintiff is, along with Defendant G-Lam, one of several subcontractors on the project to reconstruct the

19a

Bobsled Run at Mount Van Hoevenberg, North Elba, New York.

2. As such, each of these subcontractors has rights under the Lien Law of the State of New York against the owner of property upon which the work is being performed and for which services are being rendered.

3. The Lien Law of New York provides for parity among lienors.

4. Plaintiff should not be paid pursuant to its action to foreclose the lien until the claims that are arising under those liens are all disposed of in an equitable and equal fashion.

5. Accordingly, no payment should be made to Plaintiff until all matters involving the liens of the various subcontractors are adjudicated, or settled, or otherwise consented to by all parties having liens on the subject property.

CROSSCLAIMS AGAINST ALL DEFENDANTS

FIRST COUNT

1. On February 15, 1975, the Defendant G-Lam entered into a contract with CEI to perform various services and to supply materials for a project intended to renovate and improve certain facilities at Mount Van Hoevenberg, in North Elba, New York.

2. The services to be performed and materials to be supplied were for the benefit of the other Defendants, the

20a

United States through its agency CSA, the State of New York, the Town of North Elba, New York, which parties were to finance and sponsor the work herein described with CEI as their prime contractor and agent.

3. The particular services to be performed included refrigeration of the lower one-half of the bobsled run at that site.

4. Plaintiff performed all of these services, with the assistance of various subcontractors, promptly and in a superior and workmanlike fashion.

5. Despite Plaintiff's performance of these services and supplying of these materials in a superior and workmanlike fashion, these Defendants have refused to pay Plaintiff for the full value of the services performed and materials supplied.

6. The Defendant G-Lam's contract with CEI was entered into for the amount of \$382,000. This contract sum included refrigeration system, architectural services, supplies of materials for the refrigeration system, engineering services, and installation of the refrigeration system and other ancillary work.

7. On December 31, 1975 a Change Order was issued which increased the contract price by a net amount of \$20,171, making the total amount for the contract \$402,171.

21a

8. Of this amount, \$102,600 has been paid by CEI to G-Lam as of December 31, 1975, but no further payments have been made, and CEI has refused to pay any additional sums despite timely notices and certificates and frequent and repetitive demands made by Defendant G-Lam.

9. At this time CEI owes, but has refused to pay, to Defendant G-Lam, an amount of \$127,946.

10. Defendants CEI, the State of New York, and the United States of America are in default and have breached their contract with Defendant G-Lam in refusing to pay the aforesaid sums or to continue with the project, despite due demand, and despite the fact that the work was performed by G-Lam and its subcontractors without protest, absent any deficiencies, and in a superior, workmanlike manner, and despite the fact that Defendant G-Lam has been ready, willing and able at all times to proceed with the project.

SECOND COUNT

11. Defendant G-Lam repeats and realleges all of the allegations set forth above in these counterclaims and crossclaims as if fully set forth hereinafter.

12. On or about December 17, 1976, Defendant G-Lam filed a Notice of Lien with the Comptroller of the State of New York and with the Commissioner of the Department of Environmental Conservation, State of New York, in due form, claiming the sum

of \$127,946, together with interest being the amount owed Defendant G-Lam under the aforesaid subcontract against the interest of Defendant CEI in monies due or to become due relative to the contract.

13. Neither said lien nor Defendant G-Lam's claim has been waived or discharged in whole or in part, and no proceedings have heretofore been instituted for the foreclosure or enforcement thereof.

14. On information and belief, at the time of the filing of the aforesaid Notice of Lien, there was due and owing from the USA and/or the State of New York to Defendants CEI and/or Defendant G-Lam under the terms of a grant set forth in Plaintiff's Complaint, and under the contract, a sum in excess of any monies claimed due by Defendant G-Lam in its lien.

THIRD COUNT

15. Defendant G-Lam repeats and realleges all of the allegations set forth above as if fully set forth hereinafter.

16. The Defendant CEI, and the other Defendants, the State of New York, and the U.S. Government, have refused to pay G-Lam for services performed and materials supplied and are in substantial arrears in such payment, as set forth above.

17. Upon information and belief, these Defendants have no intention of making such payments to Defendant G-Lam, or to

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insure that such payments are made, despite the fact that they have acknowledged the satisfactory and complete performance of all services and accepted all materials supplied as within the terms and conditions of the contract.

18. Upon information and belief, Defendant G-Lam understands that these Defendants are in the process of arranging for other contractors to perform the work for which Defendant G-Lam was retained, which contractors will receive payments and other forms of compensation for supplying services nearly identical to those performed and to be performed by Defendant G-Lam.

19. Upon information and belief, and upon the representation of Defendant's CEI counsel, Defendant CEI has no funds, and has not had funds since at least the beginning of 1976, with which to pay Defendant G-Lam.

20. Upon information and belief, the Defendant United States Community Services Administration and State of New York are planning to appropriate monies to Defendant CEI, or have already so appropriated monies, to pay other contractors for the services that were to be supplied by G-Lam.

21. Consequently, Defendant G-Lam has no adequate remedy at law in recovering the amounts that are due and owing, and that have been due and owing since December 31, 1975, unless the aforesaid liens can be enforced.

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22. Accordingly, Defendant G-Lam prays that this Court issue an injunction against Defendants CEI, State of New York, United States, and any other agencies or agents of these Defendants from granting any contracts to other parties without full compensation to Defendant G-Lam, or without G-Lam's express written consent.

THIRD PARTY COMPLAINT AGAINST ITT
AND THE TOWN OF NORTH ELBA
FIRST COUNT

1. Defendant G-Lam repeats and realleges all of the allegations heretofore set forth above, as if fully set forth herein.

2. ITT is, upon information and belief, a Delaware corporation, whose principal place of business is in New York, New York.

3. On or about October 1975, Defendant G-Lam issued a purchase order to International Telephone and Telegraph Ice Rinks, a unit of ITT, to supply a refrigeration system for the above-mentioned project.

4. ITT has supplied a substantial portion of that refrigeration system by delivering to the site, or by manufacturer, and storage.

5. The equipment heretofore furnished by ITT amounts in value to \$56,623.13.

6. Upon information and belief, ITT duly filed a Notice

of Lien on various parties. including some of the aforesaid Defendants.

7. ITT is a necessary and indispensable party for the proper resolution of the Plaintiff's disputes with Defendants concerning this project, since their lien must be considered at the same time as all other parties' liens on this project.

SECOND COUNT

8. Defendant G-Lam repeats and realleges all of the allegations set forth above in the counterclaim and cross-claims.

9. Upon information recently furnished to Defendant G-Lam by State government representatives, the Town of North Elba is an owner of the site upon which the work set forth above was to be performed.

10. The Town of North Elba is a public body authorized and incorporated under the Laws of New York, and at all times knew of, and consented to the project described above.

11. The Town of North Elba is a necessary and indispensable party for the proper resolution of the disputes referred to above.

WHEREFORE, Defendant G-Lam prays for Judgment:

1. Granting it a judgment in the amount of \$127,946, plus interest from December 31, 1975, against each and every one of the Defendants jointly and severally for their breach

of contract.

2. Granting a judgment in favor of Defendant G-Lam against each and every one of the Defendants jointly and severally, adjudicating that Defendant G-Lam's lien is a valid lien to the extent of \$127,946 plus interest against monies due or become due from the United States or from the State of New York or any other funding authorities relative to the contract of the Mount Van Hoevenberg Bobsled Run, Town of North Elba, County of Essex, State of New York.

3. Enjoining Defendants the United States, the State of New York and CEI from letting, or entering, or otherwise inviting any contracts for the work to be performed by G-Lam on this project, and at this site, until G-Lam has been duly compensated.

4. Joining ITT and the Town of North Elba, New York as party defendants in this action.

5. Granting Defendant G-Lam the costs of this action, and such other and further relief as this Court deems just and proper.

Yours, etc.

O'CONNELL AND ARONOWITZ, P.C.
Local Counsel for Defendant, G-Lam
Office and P.O. Office
100 State Street
Albany, New York 12207
518-462-5601

O'CONNELL AND ARONOWITZ, P.C.

BY: Barry R. Fischer
Barry R. Fischer, Esq.

LEWIS AND DeCLEMENTE
General Counsel for Defendant, G-Lam
508 45th Street
Union City, New Jersey 07087

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUSTIN P. LATONA, d/b/a J.F. LATONA
CONSTRUCTION CO., INC.,

Plaintiff,

- against -

FEDERAL DEFENDANT'S ANSWER
TO CROSS-CLAIM OF DEFENDANT,
G-LAM CORPORATION

G-LAM CORPORATION, THE COMMITTEE FOR
ECONOMIC IMPROVEMENT OF ESSEX COUNTY,
INC. (CEI), THE PEOPLE OF THE STATE
OF NEW YORK and U.S. COMMUNITY SERVICES
ADMINISTRATION (CSA) formerly known as
U.S. Office of Economic Opportunity (OEO),

Civil No. 76-CV-436

Defendants.

The federal defendant, U.S. COMMUNITY SERVICES ADMINISTRATION (CSA), formerly known as U.S. Office of Economic Opportunity (OEO), by its attorney, PAUL V. FRENCH, United States Attorney for the Northern District of New York, as and for its answer to the cross-claim of defendant, G-LAM CORPORATION, upon information and belief, respectfully:

FIRST: ADMITS the truth of the averments contained in paragraphs 3 and 6 of said defendant's cross-claim.

SECOND: DENIES knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 4, 5, 7, 8, 9, 12, 13, 14, 18, 19 and 20 of said defendant's cross-claim.

THIRD: DENIES the truth of the averments contained in paragraphs 1, 2, 10, 16, 17 and 21 of said defendant's cross-claim except specifically,

(a) with respect to paragraph 1, admits that on or about February 10, 1975, an agreement was entered into between the owner, Olympic Bobrun Committee for Economic Improvement of Essex County, Inc., hereinafter, CEI, and the contractor,

G-LAM, Inc., the only parties thereto, for the refrigeration of the lower one-half mile of the Bob Sled Run, located at Mount Van Hoevenberg, Lake Placid, New York, hereinafter, the project,

(b) with respect to paragraph 2, admits that the UNITED STATES OF AMERICA, which is not a party to this action, acting through its Community Services Administration (CSA), has provided monetary grant assistance to CEI for partial funding of the project and

(c) with respect to paragraph 10, lacks knowledge or information sufficient to form a belief as to the truth of the averments that the contractor, G-LAM, INC., and its sub-contractors have satisfactorily performed all the contractual obligations to CEI.

FOURTH: STATES that paragraph 22 of said defendant's cross-claim contains conclusions of law and not averments of fact, and that no response is therefore required to this paragraph.

FIFTH: REPEATS its respective responses to the averments repeated, reiterated and realleged in paragraphs 11 and 15 of said defendant's cross-claim.

AS AND FOR FIVE SEPARATE AND DISTINCT AFFIRMATIVE DEFENSES TO SAID DEFENDANT'S CROSS-CLAIM, THE FEDERAL DEFENDANT, BY ITS ATTORNEY, AVERS:

FIRST DEFENSE

SIXTH: That said defendant's cross-claim fails to state a claim upon which relief can be granted against the federal defendant, CSA.

SECOND DEFENSE

SEVENTH: That the U.S. District Court lacks jurisdiction over the person of the federal defendant, CSA, and lacks jurisdiction over the subject matter of the cross-claim with respect to the federal defendant, CSA, on grounds that CSA has not been authorized by an Act of Congress to sue and be sued, and because this cross-claim is in effect a suit against the United States of America to which the latter has also not consented.

THIRD DEFENSE

EIGHTH: That said defendant has failed join an indispensable party-defendant, UNITED STATES OF AMERICA, in this action.

FOURTH DEFENSE

NINTH: That the U.S. District Court lacks jurisdiction over the subject matter of this action under 28 U.S.C. Section 1346(a)(2), since said defendant's claim against the United States of America, if any, exceeds the sum of \$10,000.00.

FIFTH DEFENSE

TENTH: That there is an absence of privity of contract between said defendant, and the federal defendant, CSA, or the UNITED STATES OF AMERICA.

Dated: February 14, 1977.

Albany, New York.

PAUL V. FRENCH
UNITED STATES ATTORNEY
Northern District of New York
Attorney for Federal Defendant,
United States Community Services
Administration
U.S. Court House & Post Office
Albany, New York 12207

BY Richard K. Hughes
RICHARD K. HUGHES
Assistant U.S. Attorney

Not. of Motion to Amend Ans., Counterclaim,
Crossclaim and 3rd-Party Claim

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United States District Court
Northern District of New York

Justin F. Latona, d/b/a J. F. Latona
Construction Co., Inc.,

Plaintiff,

Notice of Motion

-against-

Civil No. 76-CV-436

G-Lam Corporation, The Committee for
Economic Improvement of Essex County,
Inc. (CEI), The People of the State
of New York and U.S. Community Services
Administration (CSA) formerly known as
U.S. Office of Economic Opportunity (OEO),

Defendants.

G-Lam Corporation,

Plaintiff,

-against-

International Telephone and Telegraph
Corporation, and Town of North Elba,
New York,

Defendants.

Please take notice, that the undersigned will move this
Court at the United States Court House, City of Albany, New York,
on the 18th day of April, 1977, at 9:00 o'clock in the forenoon,
or as soon thereafter as counsel can be heard, for an order

Not. of Motion to Amend Ans., etc.

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granting defendant G-Lam Corporation's motion to:

- 1] amend its "answer, counterclaim, crossclaim and third party claim" served on or about December 20, 1976 (hereinafter referred to collectively as G'Lam's "answer") to include, among other things, an impleader against defendant International Telephone and Telegraph ("ITT")
- 2] amend its crossclaim against defendant Committee for Economic Improvement of Essex County ("CEI")
- 3] join as a third party defendant Robert Brodsky

Yours, etc.

O'Connell and Aronowitz, P.C.
Local Counsel for Defendant,
G-Lam

By: _____

Dated:

Office and P.O. Office
100 State Street
Albany, New York 12207

Lewis & DeClemente, Esqs.
General Counsel for Defendant,
G-Lam

By: _____

508 - 45th Street
Union City, New Jersey 07087

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United States District Court
Northern District of New York

Justin F. Latona, d/b/a/ J. F. Latona
Construction Co., Inc.,

Plaintiff,

-against-

G-Lam Corporation, The Committee for
Economic Improvement of Essex County,
Inc. (CEI), The People of the State
of New York and U.S. Community Services
Administration (CSA) formerly known as
U.S. Office of Economic Opportunity (OEO),

Defendants.

Affidavit in Support
of G-Lam's Motion to
Amend Answer and in
Opposition to ITT's
Motion to Dismiss

Civil No. 76-CV-436

G-Lam Corporation,

Plaintiff,

-against-

International Telephone and Telegraph
Corporation, and Town of North Elba,
New York,

Defendants.

State of New Jersey)
:
County of Bergen)

Anthony V. Genovese, being duly sworn, deposes and says:

1. I am secretary of G-Lam Corporation, a defendant in

refrigeration system for the run. On or about September, 1975, ITT agreed with G-Lam to provide the equipment required for refrigerating the bobsled run.

6. Work was proceeding in the Fall of 1975 and the early Winter. At that time, all the interested parties in the project agreed to temporarily suspend progress on the project until late in the Winter.

7. At the time the work was suspended, CEI and the Governmental agencies knew, and G-Lam had notified them, (and had submitted estimated to CEI) that no less than \$104,000 was owed to G-Lam for the work performed and equipment supplied.

8. Thereafter, G-Lam notified CEI that it was ready, willing and able to resume the work but CEI and the Governmental agencies withheld approval to permit resumption, and reported that they could not pay for the work already performed and equipment supplied, but were undertaking to ensure that payment would be made. The efforts continued throughout 1976, with statements being made by CEI's representative and by representatives of the Government that they desired to have the work resumed, but that they were not in a position to ensure the availability of funds.

9. At no time during that period did CEI, or any other party, advise G-Lam that they were in default on the contract or that they had breached the contract or that there was any valid reason for CEI terminating the contract.

10. However, after this action was initiated and cross-claims were filed against CEI to recover the sums set forth above, CEI filed a notice of termination dated January 24, 1977 and reported that it had made a demand for arbitration of the dispute between CEI and G-Lam.

11. The notice of termination that was ultimately sent to G-Lam on or about February 2, 1977 (Exh. 1) alleges failure of design and failure to properly and timely perform the work. There was no bill of particulars or specifics as to the manner in which G-Lam or its architect or designer had performed contrary to the contract or otherwise in breach of the contract, or any warranties.

12. The arbitration demand sought relief for "persistent numerous and substantial breaches" by G-Lam in the amount of \$1,000,000.

13. At about that time, I was invited to meet with representatives of CEI and the Government in New York in an effort

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to determine the status of the project and with the hope that an attempt could be made to avoid litigation.

14. The meeting ultimately took place in Lake Placid on March 5, 1977. ITT, which had also been invited to attend, did not. At that meeting, I was advised by CEI representatives that the basis for their claims of breach were that:

(a) there was late delivery of the refrigeration equipment

(b) the equipment and design offered and/or supplied by ITT will not work

15. Thus, CEI's defense to our claims against it will bring, and has brought, ITT into the picture as a vital party, and because of the claims that CEI has now made against G-Lam (for the substantial sum of \$1,000,000), G-Lam will look to ITT for indemnification.

16. It was ITT's equipment that G-Lam ordered, and it was their design which G-Lam relied upon to perform this work on the bobsled run. Whether CEI's allegations have any validity will have to be determined by the Court, but the success or failure of

G-Lam's claims or defenses turn completely on the performance of ITT.

17. It is true that CEI has demanded arbitration of its dispute between G-Lam and that organization. However, it is G-Lam's contention that the demand is inappropriate, untimely, and unjustified under the circumstances, that CEI has waived, or is estopped from asserting that form of relief, and that in any circumstance, it would be inequitable and would defeat the interest of speedy and complete litigation to maintain that separate action in that separate forum.

18. This Court will decide whether arbitration is the proper forum to resolve the disputes between CEI and G-Lam. But even if it rules that arbitration is permissible, the third-party action against ITT should be allowed, because it represents the most appropriate and convenient forum for adjudication of G-Lam's claim for indemnification against ITT, and the only forum in which all the disputes arising out of this project can be adjudicated.

19. In addition, as was previously alleged, ITT has filed one or more liens against CEI, Essex County and the State of New York in the amount of approximately \$56,000, the amount it claims to be due for the materials furnished to the job.

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20. Consequently, as we alleged in the complaint, ITT is a party needed for just adjudication of the various liens pending on this project.

21. In any event, in the interest of justice, G-Lam should be allowed to implead ITT concerning the claims and charges alleged by CEI.

Impleader against Robert Brodsky

22. When ITT was retained to perform the design and supply the equipment for this refrigeration project, it was stipulated that ITT would itself retain an engineer professionally qualified in New York to prepare plans.

23. ITT retained an engineer, Robert Brodsky, who, upon information and belief, is licensed, and practices in New York, and who prepared and signed the various plans and drawings for the refrigeration system.

24. Insofar as CEI has any defenses, or claims against G-Lam for inadequate or otherwise unworkable plans and specifications, ITT and its engineers and representatives, and Mr. Brodsky, will be liable over to G-Lam.

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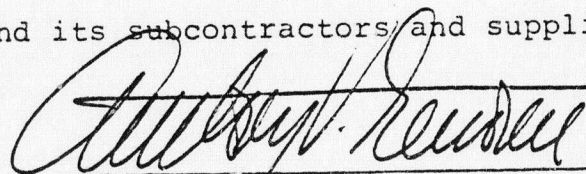
25. Accordingly, Mr. Brodsky is, or may be, a necessary party in adjudicating the liabilities to be assessed, if any, and he will be necessary to the presentation of G-Lam's defenses to claims by CEI concerning the professional quality, the design and workmanship of the refrigeration system.

Crossclaims against CEI

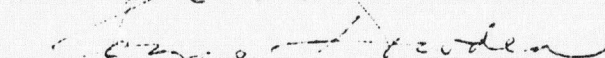
26. At the meeting held in Lake Placid on March 5, 1977, I was advised by Government representatives that a considerable amount of funds had been furnished to CEI by at least one Government agency (and perhaps more) for that organization's activities on this project.

27. These statements acknowledge that CEI had funds available for the project, but had diverted them to persons or parties other than those entitled to payment for this project.

28. If such diversion has occurred, then I am advised by counsel it would be in violation of various provisions of the Lien Law of the State of New York insofar as the funds which CEI received were held by it in the nature of a trust for various beneficiaries including G-Lam and its subcontractors and suppliers.


Anthony V. Genovese

Sworn to before me
this 4th day of April, 1977.


Notary Public

Aff. of Anthony V. Genovese, etc.

LAFFLON

MCCORMICK, URFIRER AND BROOKS, P. C.

COUNSELLORS AT LAW

CLIFFORD W. MCCORMICK
ROLAND M. URFIRER
JAMES M. BROOKS

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PLEASE REPLY TO

1156 MAIN STREET, SARANAC LAKE, N. Y. 12983
(518) 891-4660

275 MAIN STREET, LAKE PLACID, N. Y. 12946
(518) 523-3389

January 24, 1977

REGISTERED MAIL, R.R.R.

G-Lam Corporation
601 Bergen Mall
Paramus, New Jersey 07652

Genovese & Maddalene, AIA Architects
601 Bergen Mall
Paramus, New Jersey 07652

NOTICE OF TERMINATION

Gentlemen:

Please take notice that the Committee for Economic Improvement of Essex County, Inc. (CEI) hereby terminates effective immediately any and all contractual relationships, if any, it may have with G-Lam Corporation pertaining to the refrigeration of the lower one-half mile of the bobsled run at Mount Van Hoevenberg, Lake Placid, New York.

This termination is necessary because of the persistent, numerous and substantial breaches of contract on the part of G-Lam Corporation and Anthony Genovese, individually and as architect, in that the construction project which was subject to said contract was not performed in accordance with the contract documents, in that Anthony Genovese, on behalf of Genovese & Maddalene, AIA, undertook negligent, careless and unprofessional design work in his professional capacity and engaged in fraudulent practices and further in that G-Lam Corporation failed to properly and timely perform its work pursuant to the aforementioned contract documents.

As the record clearly establishes that the architects, Genovese & Maddalene, AIA, are individually and/or jointly directly involved with the ownership and management of G-Lam Corp., the Committee for Economic Improvement of Essex County, Inc., as owner, hereby places Genovese & Maddalene, AIA, on notice of termination of any contractual relationship between them and the owner, if any, effective immediately.

Please take further notice that the Committee for Economic Improve-

Exhibit 1

Page 2.

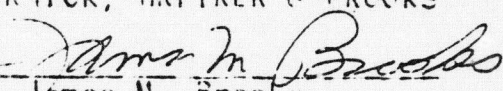
ment of Essex County, Inc., as the owner, shall pursue all available legal remedies against G-Lan Corporation and Genovese & Maddalene, AIA, and Anthony Genovese to recover for the damages sustained by the owner heretofore and hereafter arising from the above-described project.

I enclose herein a demand for arbitration.

Very truly yours,

MCCORMICK, HIRFIREN & BROOKS

By:


James M. Brooks

Attorney for CEI

jmb/ml

Encl.

Deft. G-Lam's Amended Answer, Counterclaim, Crossclaim &
3rd-Party Claim

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United States District Court
Northern District of New York

Justin F. Latona, d/b/a J. F. Latona
Construction Co., Inc.,

Plaintiff,

-against-

G-Lam Corporation, The Committee for
Economic Improvement of Essex County,
Inc. (CEI), The People of the State
of New York and U.S. Community Services
Administration (CSA) formerly known as
U.S. Office of Economic Opportunity (OEO),

Defendants.

Defendant G-Lam's
Amended Answer,
Counterclaim,
Crossclaim, and
Third Party Claim

Civ. No. 76-CV-436

G-Lam Corporation,

Plaintiff,

-against-

International Telephone and Telegraph
Corporation, Town of North Elba,
New York, and Robert Brodsky,

Defendants.

Defendant, G-Lam Corporation, for its answer, denies
each and every one of the allegations set forth in the complaint,
except as hereinafter admitted or otherwise answered:

Paragraph

Pleading

1, 4, 6, 7, 8, 13

Admits

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2

Admits G-Lam is a New Jersey corporation.

Denies that it has an office or place of business in the Village of Lake Placid, County of Essex, State of New York.

3

Admits, but lacks knowledge or information sufficient to form a belief as to the truth of the averment that CEI's principal place of business is in Keysville.

9

Admits that plaintiff entered into a contract with G-Lam for \$68,000 and that there has been paid to date to Latona \$26,500.

10

Admits upon information and belief.

11, 12

Lacks knowledge or information sufficient to form a belief as to the truth of the averment contained in these paragraphs.

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First Affirmative Defense

2. Plaintiff entered into an agreement with defendant G-Lam subject to the terms and conditions of G-Lam's contract with CEI, and subject to payment made by CEI to G-Lam.

3. Defendant G-Lam has received no payments for the services upon which plaintiff has commenced this action; consequently, plaintiff is not entitled to recover from G-Lam any of the amounts sought in its complaint.

Second Affirmative Defense

4. The agreement entered into between G-Lam and Latona provided that the owner had reserved the right to supply any and all equipment or manpower to the contract in lieu of services to be provided by plaintiff, and at the rates and amounts agreed upon by G-Lam and the owner for such services, and that these amounts would be deducted from plaintiff's contract price.

5. The owner performed certain services and supplied labor as contemplated in plaintiff's agreement with defendant G-Lam. These services that were performed were valued at \$19,339, a figure that was agreed upon by all interested parties.

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6. As a result, from the net amount of money due and owing to Latona for the services and materials supplied by him pursuant to the aforesaid subcontract, should be deducted the sum of \$26,500 paid by G-Lam and also the sum of \$19,339 of work supplied by CEI.

7. In addition, Torrington Construction Co., Inc., which was a subcontractor of the plaintiff, filed a lien for \$10,030.54, filed on December 2, 1975, which was settled by a direct payment by CEI to Torrington, plaintiff's subcontractor.

8. Accordingly, the net amount due to Latona pursuant to this subcontract is no more than \$12,130.46.

Counterclaim

1. Plaintiff is, along with defendant G-Lam, one of several subcontractors on the project to reconstruct the Bobsled Run at Mount Van Hoevenberg, North Elba, New York.

2. As such, each of these subcontractors has rights under the Lien Law of the State of New York against the owner of property upon which the work is being performed and for which services are being rendered.

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3. The Lien Law of New York provides for parity among lienors.

4. Plaintiff should not be paid pursuant to its action to foreclose the lien until the claims that are arising under those liens are all disposed of in an equitable and equal fashion.

5. Accordingly, no payment should be made to plaintiff until all matters involving the liens of the various subcontractors are adjudicated, or settled, or otherwise consented to by all parties having liens on the subject property.

Crossclaims Against All Defendants

First Count

1. On or about April, 1975, the defendant G-Lam entered into a contract with CEI to perform various services and to supply materials for a project intended to renovate and improve certain facilities at Mount Van Hoevenberg, in North Elba, New York.

2. The services to be performed and materials to be

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supplied were for the benefit of the other defendants, the United States through its agency CSA, the State of New York, the Town of North Elba, New York, which parties were to finance and sponsor the work herein described with CEI as their prime contractor and agent.

3. The particular services to be performed included refrigeration of the lower one-half of the bobsled run at that site.

4. Plaintiff performed all of these services, with the assistance of various subcontractors, promptly and in a superior and workmanlike fashion.

5. Despite plaintiff's performance of these services and supplying of these materials in a superior and workmanlike fashion, these defendants have refused to pay plaintiff for the full value of the services performed and materials supplied.

6. The defendant G-Lam's contract with CEI was entered into for the amount of \$382,000. This contract sum included refrigeration system, architectural services, supplies of materials for the refrigeration system, engineering services, and installation of the refrigeration system and other ancillary work.

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7. On December 31, 1975, a Change Order was issued which increased the contract price by a net amount of \$20,171 making the total amount for the contract \$402,171.

8. Of this amount, \$102,600 has been paid by CEI to G-Lam as of December 31, 1975, but no further payments have been made, and CEI, the United States (CSA) and the State of New York have refused to pay any additional sums despite timely notices and certificates and frequent and repetitive demands made by defendant G-Lam, and said parties have refused to continue with the project.

9. Said refusal to pay sums owed as progress payments or to continue with the project constitutes an abandonment and breach of the contract.

10. Defendants CEI, the State of New York, and the United States of America are in default and have breached their contract with defendant G-Lam in refusing to pay the aforesaid sums or to continue with the project, despite due demand, and despite the fact that the work was performed by G-Lam and its subcontractors without protest, absent any deficiencies, and in a superior, workmanlike manner, and despite the fact that defendant G-Lam has been ready, willing and able at all times to proceed with the project.

11. As a result of said breach, G-Lam and/or its sub-contractors have been denied progress payments due and owing, have incurred additional expenses in manufacturing which remain unpaid, and have lost profits and overhead recoupment in the amount of \$260,942.

Second Count

12. Defendant G-Lam repeats and realleges all of the allegations set forth above in these counterclaims and crossclaims as if fully set forth hereinafter.

13. On or about December 17, 1976, defendant G-Lam filed a notice of lien with the Comptroller of the State of New York and with the Commissioner of the Department of Environmental Conservation, State of New York, in due form, claiming the sum of \$127,946, together with interest being the amount owed defendant G-Lam under the aforesaid subcontract against the interest of defendant CEI in monies due or to become due relative to the contract.

14. Neither said lien nor defendant G-Lam's claim has been waived or discharged in whole or in part, and no proceedings have heretofore been instituted for the foreclosure or

enforcement thereof.

15. On information and belief, at the time of the filing of the aforesaid notice of lien, there was due and owing from the USA and/or the State of New York to defendants CEI and/or defendant G-Lam under the terms of a grant set forth in plaintiff's complaint, and under the contract, a sum in excess of any monies claimed due by defendant G-Lam in its lien.

Third Count

16. Defendant G-Lam repeats and realleges all of the allegations set forth above as if fully set forth hereinafter.

17. The defendant CEI, and the other defendants, the State of New York, and the U.S. Government, have refused to pay G-Lam for services performed and materials supplied and are in substantial arrears in such payment, as set forth above.

18. Upon information and belief, these defendants have no intention of making such payments to defendant G-Lam, or to insure that such payments are made, despite the fact that they have acknowledged the satisfactory and complete performance of all services and accepted all materials supplied as within the

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terms and conditions of the contract.

19. Upon information and belief, defendant G-Lam understands that these defendants are in the process of arranging for other contractors to perform the work for which defendant G-Lam was retained, which contractors will receive payments and other forms of compensation for supplying services nearly identical to those performed and to be performed by defendant G-Lam.

20. Upon information and belief, and upon the representation of defendant CEI's counsel, defendant CEI has no funds, and has not had funds since at least the beginning of 1976, with which to pay defendant G-Lam.

21. Upon information and belief, the defendant United States, Community Services Administration and State of New York are planning to appropriate monies to defendant CEI, or have already so appropriated monies, to pay other contractors for the services that were to be supplied by G-Lam.

22. Consequently, defendant G-Lam has no adequate remedy at law in recovering the amounts that are due and owing, and that have been due and owing since December 31, 1975, unless the

Deft. G-Lam's Amended Ans., etc.

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aforesaid liens can be enforced.

23. Accordingly, defendant G-Lam prays that this Court issue an injunction against defendants CEI, State of New York, United States, and any other agencies or agents of these defendants from granting any contracts to other parties without full compensation to defendant G-Lam, or without G-Lam's express written consent.

Fourth Count

24. The defendant G-Lam repeats and realleges all of the allegations heretofore set forth above as if fully set forth herein.

25. The defendant G-Lam sues in behalf of itself and in behalf of all other persons entitled to share in the funds received or to be received by defendant CEI, contractor, from or through defendant United States (CSA) and/or defendant State of New York, in connection with the public improvement and the contract therefor between the latter three defendants and generally known as the Bobsled Run at Lake Placid, New York.

26. Defendant CEI has had knowledge of the existence of defendant G-Lam's claim against them.

27. Upon information and belief, a final payment by the defendants United States (CSA) and/or State of New York has not been made to the defendant CEI on the original contract hereinbefore referred to.

28. Pursuant to the provisions of Article 3-A of the Lien Law of the State of New York, any sums paid or owing to defendant CEI or any full or partial satisfaction thereof, and on account of said original contract or subcontracts, constitute trust funds to be applied to the payment of claims of subcontractors, laborers and materialmen, accruing during the making and construction of said public improvement.

29. There may be persons other than those named as parties to this action who have some claim upon an interest in the aforesaid trust funds and this action is especially brought for the benefit of defendant G-Lam and for the benefit of any other persons having such interest in the aforesaid trust funds.

30. Prior to the commencement of this action, defendant G-Lam duly demanded payment of the sums due and owing to the defendant G-Lam for such work, labor and services, and the defendant CEI has refused and neglected to pay the same.

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31. Upon information and belief, the defendant CEI has applied trust funds now held or heretofore held by them on account of the aforesaid public improvement for purposes other than paying the claims of all subcontractors, laborers and materialmen, notwithstanding the fact that there was due and owing to the defendant G-Lam the sum of \$127,946 for such work, labor and services performed on said public improvement at the time the defendant CEI received such trust funds or portion thereof, or at the time such trust funds became available.

32. This action is brought pursuant to Article 3-A of the Lien Law of the State of New York.

33. The defendant G-Lam has no adequate remedy at law.

Third Party Complaint
Against ITT

First Count

1. Defendant G-Lam repeats and realleges all of the allegations heretofore set forth above, as if fully set forth herein.

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2. ITT is, upon information and belief, a Delaware corporation, whose principal place of business is in New York, New York.

3. On or about May, 1975, ITT agreed to perform the design and engineering of the refrigeration system and ancillary equipment for this project and to perform its work in a prudent and skillful manner and in accordance with standard and customary engineering and design practices.

4. On or about September, 1975, defendant G-Lam ordered and ITT agreed to supply the refrigeration system for the above-mentioned project.

5. ITT undertook the design and engineering for the system, and completed those activities.

6. ITT has supplied a substantial portion of that refrigeration system by delivering to the site, or by manufacturer, and storage.

7. The equipment heretofore furnished by ITT amounts in value to \$56,623.13.

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8. Upon information and belief, ITT has filed a notice of lien for the value of the equipment supplied on various parties including some of the aforesaid defendants.

9. ITT is a necessary and indispensable party for the proper resolution of the plaintiff's disputes with defendants concerning this project, since their lien must be considered at the same time as all other parties' liens on this project.

Second Count

10. Defendant G-Lam repeats and realleges all of the allegations heretofore set forth above, as if fully set forth herein.

11. Defendant CEI has sent to defendant G-Lam a notice of termination, dated January 24, 1977, alleging that, among other things, defendant G-Lam failed to properly and timely perform its work and that defendant CEI will pursue all available legal remedies against defendant G-Lam.

12. On or about January 24, 1977, defendant CEI sent to defendant G-Lam a demand for arbitration in which defendant CEI reiterates the allegations contained in its notice of termination.

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13. On March 5, 1976, a meeting was held in Lake Placid, New York, attended by, among others, defendants G-Lam and CEI. At said meeting, defendant CEI informed defendant G-Lam that the reason why defendant CEI ceased making payments to defendant G-Lam was the alleged failure of its supplier, third party defendant ITT to timely deliver the refrigeration equipment and the alleged unworkability of such equipment or its ability to meet contract specifications.

14. Defendant G-Lam is entitled to indemnification, and recover from third party defendant ITT the amounts CEI may recover from defendant G-Lam resulting from the allegations by CEI set forth above, or for any loss, damage or injury suffered by G-Lam attributable to ITT's faulty or negligent performance.

Third Party Complaint
against Robert Brodsky

1. Defendant G-Lam repeats and realleges all of the allegations set forth above in defendant G-Lam's counterclaim, crossclaim and third party complaint against ITT.

2. As previously stated, ITT agreed to undertake, and did undertake the design and engineering of the refrigeration system for this project.

3. ITT arranged and retained other engineering services, including the services of Robert Brodsky to perform certain phases of the design and engineering of the system.

4. Brodsky is an engineer licensed to practice in the State of New York, and who, upon information and belief, has his principal place of business in New York.

5. Robert Brodsky, among other things, agreed to prepare the plans and drawings for the system and to do so in a prudent and skillful manner and in accordance with standard and customary engineering and design practices.

6. Accordingly, defendant G-Lam is entitled to indemnification, and to recover from third party defendant Robert Brodsky the amounts CEI may recover from defendant G-Lam resulting from allegations by CEI set forth above, or for any loss, damage or injury suffered by G-Lam attributable to ITT's faulty or negligent performance.

Third Party Complaint
against the Town of North Elba

1. Defendant G-Lam repeats and realleges all of the allegations set forth above in the counterclaim and crossclaims.

2. Upon information recently furnished to defendant G-Lam by State Government representatives, the Town of North Elba is an owner of the site upon which the work set forth above was to be performed.

3. The Town of North Elba is a public corporation authorized and incorporated under the Laws of New York, and at all times knew of, and consented to the project described above.

The Town of North Elba is a necessary and indispensable party for the proper resolution of the disputes referred to above.

Wherefore, defendant G-Lam prays for judgment:

1. Granting it a judgment in the amount of \$260,942, plus interest from December 31, 1975, against each and every one of the defendants jointly and severally for their breach of contract.

2. Granting a judgment in favor of defendant G-Lam against each and every one of the defendants jointly and severally, adjudicating that defendant G-Lam's lien is a valid lien to the extent of \$127,946 plus interest against monies due or becoming due from the United States or from the State of New York or any

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other funding authorities relative to the contract of the Mount Van Hoevenberg Bobsled Run, Town of North Elba, County of Essex, State of New York.

3. Enjoining defendants the United States, the State of New York and CEI from letting, or entering, or otherwise inviting any contracts for the work to be performed by G-Lam on this project, and at this site, until G-Lam has been duly compensated.

4. Impressing a trust on all funds received, held, or to be received by CEI in favor of the beneficiary G-Lam, under the provisions of Article 3-A of the Lien Law of New York, and granting all relief to which G-Lam may be entitled under Article 3-A of the Lien Law of New York.

5. Ordering ITT to indemnify G-Lam for any amounts G-Lam may be liable to other parties.

6. Granting defendant G-Lam the costs of this action, and such other and further relief as this Court deems just and proper.

Yours, etc.

O'Connell and Aronowitz, P.C.
Attorneys for Defendant, G-Lam
Office and P.O. Office
100 State Street
Albany, New York 12207
518-462-5601

Notice of Motion to Dismiss Complaint

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUSTIN F. LATONA, d/b/a J.F.
LATONA CONSTRUCTION CO., INC.,

Plaintiff,

-against-

G-LAM CORPORATION, U.S. COMMUNITY
SERVICES ADMINISTRATION (CSA)
formerly known as U.S. Office of
Economic Opportunity (OEO), et al.,

Defendants.

CIVIL NO. 76-CV-436

NOTICE OF MOTION

TO: HON. JOSEPH R. SCULLY
Clerk, U.S. District Court
U.S.P.O. & Courthouse
Albany, New York 12207

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Union City, New Jersey
Attorneys for G-LAM Corporation
Attn: Paul Lewis, Esq.

MC CORMACK, URFIRER and BROOKS, P.C.
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Attn: James M. Brooks, Esq.

HON. LOUIS J. LEFKOWITZ
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Attn: John R. Casey, Esq.

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Albany, New York 12207
Attorneys for G-LAM Corporation
Attn: Barry R. Fischer, Esq.

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MCCLUNG, PETERS AND SIMON
41 State Street
Albany, New York 12207
Attorneys for Justin F. Latona
Attn: Robert E. Simon, Esq.

SIRS:

PLEASE TAKE NOTICE that upon the annexed Defendant's Memorandum of Law dated July 1, 1977, and upon all papers filed and proceedings had herein the defendant, UNITED STATES OF AMERICA, acting through its COMMUNITY SERVICES ADMINISTRATION, by its attorney, PAUL V. FRENCH, United States Attorney for the Northern District of New York, will move the United States District Court at a Special Motion Day thereof, to be held in the United States Post Office and Courthouse, Albany, New York, on the 12th day of July, 1977, at 10:00 a.m., or as soon thereafter as counsel can be heard, pursuant to Rules 12(b)(1) and (6) and 56 of the Federal Rules of Civil Procedure for an Order, dismissing the Cross-Claims of defendant, G-Lam filed herein, on grounds that the District Court lacks jurisdiction over the subject matter of these Cross-Claims, and these Cross-Claims fail to state a claim upon which relief can be granted. The COMMUNITY SERVICES ADMINISTRATION is a non-suable federal agency and the Court lacks jurisdiction over all claims made against it and the COMMUNITY SERVICES ADMINISTRATION should be dropped as a defendant. The District Court also lacks jurisdiction over all G-Lam's Cross-Claims even if they are viewed to be against the UNITED STATES OF AMERICA, for the cross-claims are for a breach of contract in which damages are claimed by the cross-claimants in excess of the jurisdictional limit of ten thousand dollars (\$10,000.00) set by 28 United States Code Section 1346(a)(2) for district courts in suits against the United States founded upon an

Notice of Motion to Dismiss Complaint

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express or implied contract. In addition, Title 28, United States Code Section 1346(a)(2) does not authorize any injunctive relief on the attachment of the United States of America. Furthermore the Cross-Claims of G-Lam fail to state any claim upon which relief can be granted for no contract with the UNITED STATES OF AMERICA or its COMMUNITY SERVICES ADMINISTRATION is alleged.

The UNITED STATES OF AMERICA shall further move the Court, if its motion to dismiss the Cross-Claims against it and its COMMUNITY SERVICES ADMINISTRATION is granted, to remand this case to New York State Supreme Court, Essex County, pursuant to Title 28, United States Code Section 1448 for there will remain no claims against the United States, its employees, officers or agencies, the basis of removal to this District Court.

Dated: July 1, 1977.

PAUL V. FRENCH
UNITED STATES ATTORNEY
U.S. Post Office & Court House
Albany, New York 12207

BY:

Terrence M. Kelly
TERRENCE M. KELLY
ASSISTANT U.S. ATTORNEY

Deft. G-Lam's Reply Mem. in Opposition to Government's
Motion to Dismiss

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United States District Court
Northern District of New York

Justin F. Latona, d/b/a J. F. Latona
Construction Co., Inc.,

Plaintiff,

-against-

G-Lam Corporation, The Committee for
Economic Improvement of Essex County,
Inc. (CEI), The People of the State
of New York and U.S. Community Services
Administration (CSA) formerly known as
U.S. Office of Economic Opportunity (OEO),

Defendants.

Civ. No. 76-CV-436

G-Lam Corporation,

Plaintiff,

-against-

International Telephone and Telegraph
Corporation, Town of North Elba,
New York, and Robert Brodsky,

Defendants.

Defendant G-Lam's Reply Memorandum
In Opposition to Government's
Motion to Dismiss

The U.S. Government has filed a reply memorandum purporting to rebut contentions made by G-Lam in opposition to the Government's motion to dismiss. The Court, at argument, acknowledged that both parties could supplement their arguments at oral hearing with written memoranda. The following represents G-Lam's written rebuttal to the Government's oral argument and its "reply memorandum" filed subsequent to that hearing.

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I.

Preliminary

The Government's contentions in support of its motion fall flat, legally as well as equitably and morally. The Government has a responsibility to account for the failures of its own representatives and its grantees to meet contractual obligations induced to achieve benefits it intended to secure for its own good will and objectives--the completion of the first step toward the development of an American Olympic site in 1980.

The Government has sought to totally avoid perhaps the most compelling argument of all--that if CEI is a grantee, as the Government claims--G-Lam has an undisputed cause of action and standing to sue because of "agency action" that adversely affected its economic interests. Surely, the Government's absolute failure to monitor and/or supply the funds required to initiate and complete the Bobsled project or the knowing or recklessly indifferent manner in which these funds were processed or controlled by the Government would fit this well-accepted slot for judicial relief in a United States District Court.

II.

Government's First Contention
States Question of Fact That
Requires Plenary Trial

The Government states that the Blair and Hedin decisions are not germane because "the U.S. does not have a construction contract with anyone, it is merely a grantor of funds..."

This is an unsworn, unilateral, self-serving declaration by the Government--a characterization of what the relationship was, or could legally be declared by a Court to have been. But as far as we know, the Government hasn't been designated as the judge in this dispute, and whether the Government did or did not have a construction contract with CEI is a matter that must be determined by the Court.

G-Lam's position is that the Government was the owner on this project; that the project was being built with the Government's interests serving as its primary objective--the completion of an Olympic project. The Government was using CEI to achieve these objectives in whatever manner was available; in this case, they apparently used the grantor-grantee relationship to accomplish an objective they could not achieve without specific

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Congressional appropriations. The Government evidently knew at the times this project began that those appropriations would not be forthcoming for some time (they have since been made, to our knowledge).

For all intents and purposes, CEI was the construction manager, the prime contractor on this project; G-Lam was a first-tier subcontractor. Both the Government and G-Lam may have disputes over the characterization of this relationship, but it is a factual question that will have to be determined only after discovery is completed and a plenary hearing held.

III.

G-Lam's Complaint States Cause of Action as Third-Party Beneficiary

The Government admits--as it must--that there exists a cause of action by a third-party beneficiary of an agreement between the Government and another public or private entity. First, it tries to distinguish Hebbah v. U.S., 428 F. 2d 1334 and Housing Corp. of America v. U.S., 468 F. 2d 926 by stating that they acknowledged the theory but only where the third party is a bondholder. That is flat-out wrong. In both cases, the third-party beneficiary theory was acknowledged as viable and useable.

In neither case, however, was the plaintiff a bondholder.

The Government says that no allegation has been made that the Government failed to pay CEI funds. Even if that were true, it would not preclude this Court from reading this allegation into the complaint, particularly when G-Lam has had no opportunity for meaningful discovery.

But it is academic, anyway, since G-Lam, in its original complaint--(e.g., p. 8) and its proposed amended complaint (pp. 7, 9-10)--has alleged that the Government has withheld or otherwise diverted funds that should have been applied on this project for the services G-Lam performed, or was about to perform.

Furthermore, these allegations were voiced at length by counsel at several hearings. The Court, the Government, and all the parties are well aware of these charges not only through these pleadings and hearings, but also from meetings held within the past nine months to try to resolve disputes and issues.

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IV.

G-Lam Has Clear Standing to
Sue in This Court as a Party
Injured in Fact by Agency
Action

We should not overlook perhaps the most compelling arguments that can, and should be made to retain jurisdiction over the Government in this action. There is a cause of action stated, and G-Lam has standing to sue the Government in this jurisdiction, for a legal wrong caused by agency action for which it has been adversely affected and aggrieved.

5 U.S.C. §702 states:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The gist of G-Lam's cause is that Federal Government agencies and personnel abused their powers and discretion in an arbitrary, capricious and reckless manner when they approved the granting of funds to CEI for the purpose of the contract at issue in this case, and failed to ensure that the funds were properly applied as contemplated, and as required. Furthermore, that they knowingly allowed and encouraged the grantee to either use such

funds for unrelated purposes, or to use them in such a way as to undermine the objectives of the grant.

It is now well-established that if a plaintiff demonstrates that the challenged action of the Federal Government has caused that party an "injury in fact" and that the alleged injury is "to an interest arguably within the zone of interests to be protected or regulated", the plaintiff will have standing to sue in the Federal Courts. Data Processing Service v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Cady v. Morton, 527 F. 2d 786 (9th cir., 1975); Scanwell Laboratories v. Shaffer, 424 F. 2d 859 (D.C. cir., 1970); Citizens Comm. for Hudson Valley v. Volpe, 425 F. 2d 97 (2d cir., 1970).

These principles are particularly applicable where the injuries claimed are palpable economic injuries. See, e.g., Sierra Club v. Morton, 405 U.S. 727, 733 (1971) (there would be standing even if the injury were non-economic).

There is a general rule that overlays the entire arena of Federal grants that:

"The Federal Government not only has a right to impose conditions in the expenditure of funds but also has an obligation to assure that State and local grantees properly expend funds."

Madden, "Providing an Adequate Remedy for Disappointed Contractors under Federal Grants-in-aid", 34 Fed. B. J. 201, 207 (1975)

Title 31, §628 provides that funds appropriated for expenditures in public service "shall be applied solely to the objects for which they are respectively made, and for no others."

The Comptroller General has recognized the obligations and duties inherent in the grant powers provided by statute:

"The acceptance of the grant creates a contract between the United States and the grantee under which the moneys paid over to the grantees, while assets in the hands of the grantee, are charged with the obligation to be used for the purposes and subject to the conditions of the grant. Clearly, the United States has a reversionary interest in the unencumbered balances of such grants, including any funds improperly applied. It is the responsibility of the Department for seeing that the grant funds are applied to the purposes and objects for which made..." (42 Comp. Gen. 289, 294 (1964) (emphasis supplied)

In addition, there are numerous "relevant statutes" applicable within the meaning of 5 U.S.C. §702. The Department of Health, Education & Welfare's Office of Economic Opportunity, which became, in 1975, the Community Services Administration,

along with the Department of Commerce's Economic Development Administration, were the Federal agencies responsible for funding this project through CEI, apparently under numerous statutory authorizations, including the right to jointly fund projects meeting the objectives of community action and expanding job opportunities, 42 U.S.C. §2962, and the right to effect combinations among projects and programs to achieve those objectives, 42 U.S.C. §2976.

The statutes governing these two agencies also set forth mandates for fiscal responsibility. 42 U.S.C. §2835 provides that no funds shall be released to any agency receiving financial assistance until extensive auditing procedures have been set up to safeguard Government assets and to encourage fiscal responsibility in such agencies. Periodical audits of these agencies are required. Ibid.

In any program of Federal assistance such as this, the Government officers responsible are required to "retain the right to direct that on severance of the grant relationship, the assets purchased with grant funds shall continue to be used for the original purpose for which they were granted." 42 U.S.C. §2982c.

The actions of Government officials in failing to establish such auditing and fiscal procedures; their actions in failing to ensure that funds earmarked for this project were, in fact, used for this project; their refusal to permit all funds allocated to be used for the fundamental purposes of this program; and their possible impoundment of funds earmarked by the U.S. for this project, are more than sufficient bases for finding the necessary jurisdictional nexus and reviewability required.

As such, G-Lam, a party whose economic interests were entirely wrapped up with CEI's receipt and proper use of such funds, was palpably injured in the manner contemplated by 5 U.S.C. §702.

There is an abundance of authority to support G-Lam's right to maintain an action against the Federal Government in this forum:

In Contractors Ass'n. of Eastern Pa. v. Secretary of Labor, 442 F. 2d 159 (3d cir., 1971), the Third Circuit held that bidders for a construction contract with a Federal grantee were directly impacted by contract provisions mandated by the Government, and thereby had standing to sue the Government in the District Court to bar the grantee from imposing those provisions.

In Davis Associates Inc. v. Secretary, U.S. Dept. of H. & V. Dev., 373 F. Supp. 1256 (D. N.H., 1974) aff'd 498 F. 2d 385 (1st cir.), the Court held that a bidder on a thwarted invitation to bid issued by a grantee of the Government, Dover Housing Authority, had standing to sue the Federal Government for its "arbitrary and capricious" disapproval of the bid.

In Shannon v. United States Dept. of Housing & Urban Dev., 436 F. 2d 809 (3d cir., 1970), the Court held that residents of a potential HUD housing project had standing to sue the Government to enjoin it from indemnifying a private corporate grantee to build low income housing in a highly-concentrated low income area. See also Union Carbide Corp. v. Train, ____ F. Supp. ____, 76 Civ. 5272 (S.D. N.Y., 1977).

And in Community Action Prog. Exec. Dir. Ass'n. of N.J. Inc. v. Ash, 365 F. Supp. 1355 (D. N.J., 1973), the Court held that directors of a planned OEO community action program had standing to sue the Federal Government for impounding funds earmarked for several Federal grantees. It is interesting that the "injury" demonstrated there was simply that some plaintiffs would have benefitted from salaries under the program had the program gone through, or some plaintiffs had expended money and

effort in anticipation of the start of the program, which the Court said gave them "personal stakes in the outcome" of the controversy (365 F. Supp. at 1358-59). Certainly, if these directors had standing for the expenditure of anticipated income, or the expenditure of nominal amounts of their personal funds in anticipation of the program, or because they would have had jobs had the program gone through, G-Lam has at least an equally-- indeed far more compelling--stake in the outcome as a contractor and the intended recipient of progress payments for work already done, certified and accepted, as well as work to be done on a contract executed by CEI and explicitly approved by the U.S. Government.

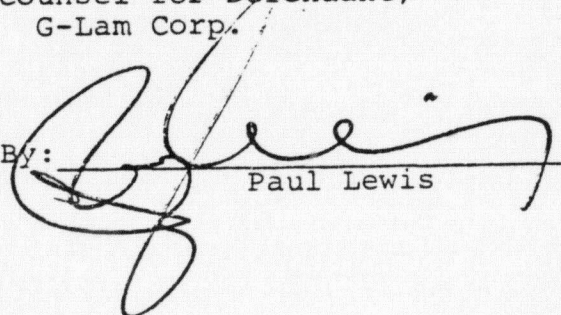
Certainly, if a group of contractors could bring into the District Court, their squabble about the kind of provisions the Federal Government was mandating in grant-assisted projects, as in the Contractors' Association case, G-Lam has standing in that Court to complain about the Government's failures to see that funds already appropriated and earmarked were properly applied.

Conclusion

For the reasons stated above, defendant G-Lam respectfully requests that the United States Government's motion to dismiss be denied.

Respectfully submitted,

Lewis & DeClemente
Counsel for Defendant,
G-Lam Corp.

By: 

Paul Lewis

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUSTIN F. LATONA, d/b/a J. F. LATONA CONSTRUCTION
CO., INC.,

Plaintiff,

76-CV-436

-against-

G-LAM CORPORATION, THE COMMITTEE FOR
ECONOMIC IMPROVEMENT OF ESSEX COUNTY, INC.,
(CEI), THE PEOPLE OF THE STATE OF NEW YORK
and U.S. COMMUNITY SERVICES ADMINISTRATION
(CSA) formerly known as U.S. OFFICE OF
ECONOMIC OPPORTUNITY (OEO),

Defendant and Third-Party Plaintiffs,

-against-

INTERNATIONAL TELEPHONE AND TELEGRAPH
CORPORATION, and TOWN OF NORTH ELBA, NEW YORK,

Third-Party Defendants.

APPEARANCES:

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JOHN R. CASEY

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JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This suit came before this Court pursuant to a timely petition for removal filed on behalf of the United States Community Services Administration (CSA), formerly known as the United States Office of Economic Opportunity (OEO). 42 U.S.C. § 2941 et seq. (Supp. 1977). Such removal was premised upon 28 U.S.C. §§ 1441 and 1442. But for the presence of the federal defendant, however, this case arises wholly under State law. The removed action was commenced in the Supreme Court of New York, Essex County. That is, the foundation of this dispute arose out of the financing and construction of the Bobsled Run at Mount Van Hoevenberg, Town of North Elba, Essex County, New York. This location and facility comprises a significant part of the overall sports complex for the 1980 Winter Olympic Games.

FACTUAL BACKGROUND

After the removal the posture of the litigation in this Court became increasingly complex. An inquiry into the factual background is necessary, and for purposes of clarity, a chronological recitation is helpful.

On February 10, 1975, the Committee for Economic Improvement of Essex County, Inc. (CEI), a defendant herein, entered into an agreement with G-Lam, a New Jersey corporation, for the construction of a refrigeration system upon the lower 1/2 mile of the Bobsled Run at Mount Van Hoevenberg. G-Lam, as will be seen subsequently, is the cross-claiming defendant and third-party plaintiff herein.

CEI contracted in the capacity as owner; however, it appears that the facility in dispute herein is being constructed upon land owned by the State of New York and the Town of North Elba. For this reason, both New York State, as a defendant, and the Town, as a third-party defendant, are now in the suit. G-Lam was the

general contractor, and, in that capacity, was responsible for the hiring of subcontractors to perform various details of the project.

The projected date of completion, according to the terms of the contract, was September 1, 1975. The contract sum, as amended in December 1975, was \$402,171.00. Partial funding of the project came from the defendant United States Community Services Administration (CSA). Additionally, under the terms of the contract, it appears that progress payments were contemplated, subject to the architect's approval in the case of final payments, upon substantial completion (75%) of the project.

Pursuant to its contractual obligations, G-Lam thereafter engaged various subcontractors to perform details of the project. Unquestionably, the most important of these subcontractors was ITT Ice Rinks, a division of International Telephone & Telegraph Co. (ITT), with its principal place of business in Midland Park, New Jersey. ITT, a Delaware corporation, with its principal place of business in New York, is also a third-party defendant in the action.

It is alleged that on or about May 7, 1975, G-Lam's architect entered into a contract with ITT Ice Rinks, whereby the latter undertook the design of the refrigeration system to be installed on the lower 1/2 mile of the Bobsled Run. Subsequently, on September 4, 1975, these parties entered into a contract whereby ITT Ice Rinks would furnish the material and equipment for the refrigeration system. The contract price for this system was \$219,000.00.

Throughout most of 1975, work proceeded upon the project without incident or dispute. The record reveals that progress payments were made, and, in turn, G-Lam paid its various subcontractors for labor and materials. It is alleged, however, that no further payments were made to G-Lam by CEI after December 31, 1975; consequently, it necessarily followed that the amounts owed various subcontractors by G-Lam, similarly remained unpaid. From the record, it is discernible that no further work has been done on the project which

now stands approximately 65% completed.

During the Spring of 1976, there were efforts made by attorneys for CEI to reach some accommodation between all of the concerned parties. See Exhibit 1 accompanying G-Lam's motion to stay arbitration. These efforts did not succeed inasmuch as CEI apparently was without adequate funds to meet G-Lam's request for a progress payment as of December 31, 1975.

With this knowledge, various subcontractors, including those who are not parties herein, sought to protect their individual interests by filing mechanics' liens under New York law against CEI. See New York Lien Law § 1 et seq. (McKinney 1966). On December 2, 1975, Torrington Construction Co., Inc., which is not a party to this litigation, filed its Notice of Lien. See N.Y. Lien Law § 12 (McKinney 1966). These liens were settled and released by direct payment from CEI to Torrington.

On June 4, 1976, Justin F. Latona, d/b/a J.F. Latona Construction Co., Inc. (Latona), a New Jersey resident, and, the named plaintiff in the action here, filed its Notice of Lien based upon work performed at the Bobsled facility as a subcontractor of G-Lam.

Thereafter, the events which added to the complexity of this litigation that wound up in this federal court unfolded at an accelerated pace. First, on September 24, 1976, plaintiff Latona commenced a lien foreclosure action in the Supreme Court of Essex County against G-Lam, CEI, the State of New York and the United States Community Services Administration. ITT, understandably concerned by its failure to be paid for the special manufacture and shipment of a portion of the refrigeration equipment, then filed its Notice of Lien against CEI on September 27, 1976. On October 22, 1976, the federal defendant CSA, filed a timely petition for removal to this Court. See 28 U.S.C. § 1446.

After the removal of the litigation to this Court, what might have been a routine State case involving contracts and liens,

instead, seemed to become a complicated federal one. On November 24, 1976, defendant CEI, by its failure to respond to the summons and complaint of the plaintiff Latona, allowed a default judgment to be entered against it -- such judgment signed and entered by the Clerk of this Court. On that same date, defendant CEI paid \$20,000.00 to plaintiff Latona in consideration of a general release from the default judgment which was entered in the amount of \$24,720.46.

Thereafter, on December 17, 1976, G-Lam filed its Notice of Lien against CEI for an amount in excess of \$127,000.00. And, on December 21, 1976, G-Lam, in the removed action, filed its answer, counterclaim, cross-claim and third-party claim. The consequences of this pleading were manifold: (1) it alleged that CEI's previous independent settlements with subcontractors Latona and Torrington violated those sections of the Lien Law which provide for parity amongst lienors; (2) it cross-claimed against defendants CEI, New York State and the CSA for their failure to pay for services performed and materials supplied by G-Lam under its contract with CEI; and, (3) it added two third-party defendants, ITT and the Town of North Elba, as indispensable and necessary parties because of their status as lienor and property owner, respectively.

To further add to the complexity and confusion being created in this litigation, two additional significant events occurred in 1977. First, on January 24, 1977, defendant CEI sent a letter to G-Lam terminating any contractual commitment between the parties regarding the refurbishment and refrigeration of the Bobsled Run. This letter was accompanied by a demand for arbitration as provided by Article 13 of the February 10, 1975 contract. This demand was purportedly occasioned by G-Lam's "numerous and substantial breaches" causing CEI to suffer damages totaling \$1,000,000.00. Subsequent meetings between these parties reveal that the gravamen of the arbitration demand is premised upon an alleged untimely delivery of the refrigeration equipment and its design failure.

The second event of importance occurred on February 23, 1977, at which time ITT commenced an action against G-Lam in New Jersey which seeks to recover amounts owing to it under the contract of September 4, 1975. The present status of that action is unclear; however, it appears that a motion to stay proceedings is pending before the New Jersey forum. See June 7, 1977 letter of Paul Lewis addressed to this Court.

Against this entangling web of facts, this Court was first confronted with four motions returnable on April 18, 1977: (1) a motion for an order staying all proceedings pending arbitration by defendant CEI (original motion returnable February 9, 1977); (2) a cross-motion to stay arbitration, by defendant G-Lam; (3) a motion to dismiss by the third-party defendant ITT (original motion returnable March 21, 1977); and (4) motions by defendant and third-party plaintiff, G-Lam, to amend its answer against ITT (impleader under Rule 14, Fed. R. Civ. Pro.), amend its cross-claim against CEI, and to join Robert Brodsky as a third-party defendant. Brodsky is alleged to have prepared the plans, specifications and drawings for the refrigeration system.

During oral argument on these motions, the attorney for defendant CEI suggested a 60-day moratorium be granted prior to consideration and resolution of these motions. At that time, hopes for an amicable settlement were expressed by several of the other attorneys in open court. Various communications received from the parties during this 60-day period, however, revealed that no agreement had been reached. As a consequence, the above motions were reargued on June 20, 1977 by attorneys for G-Lam and ITT. Defendant CEI was not represented, presumably due to prior commitments. See June 13, 1977 letter of James M. Brooks addressed to this Court. Attorneys were present for the State and federal defendants; however, they did not present any oral arguments. At that time, I reserved decision upon the above motions.

On July 1, 1977, the federal defendant, U.S. Community Services Administration (CSA) filed a notice of motion to dismiss the cross-claims against it and for summary judgment. These motions were returnable on August 8, 1977, and then argued by counsel for G-Lam and for the federal defendant. No other attorneys appeared. The federal defendant's motions assert that the Court does not have subject matter jurisdiction for purposes of awarding any of the relief sought against it by the cross-claims of G-Lam. These contentions are substantial and warrant the Court's initial inquiry, because, in my judgment, the decision made herein in favor of the federal defendant renders the other motions moot.

DISCUSSION

Prior to any examination of the merits of the federal defendant's contentions, an inquiry into the substantive allegations of the cross-claims is necessary.

G-Lam's cross-claims are directed against defendants CEI, the State of New York and the United States Community Services Administration. These claims are set forth in three Counts. For purposes of the following summation, it may be assumed that each Count is directed to all of these defendants. The first Count alleges the existence of a contract between G-Lam and CEI and that \$127,946.00 is owed to G-Lam for labor and materials. It is also alleged that the State and federal defendants have breached this contract. The second Count avers to G-Lam's Notice of Lien, which purportedly has not been discharged or foreclosed. Specifically, it is alleged that a sum in excess of the amounts claimed by G-Lam was owed by the defendant CSA to defendant CEI and/or G-Lam. The third Count avers, upon information and belief, that the defendant CSA, in conjunction with the remaining defendants, are contemplating the replacement of G-Lam with other contractors to perform the work contemplated by G-Lam's contract with CEI.

Against these allegations, G-Lam seeks the following relief

from the federal defendant: (1) a money judgment for \$127,946.00; (2) declaratory relief regarding the validity of its lien; and (3) injunctive relief to prevent the hiring and/or compensating of other contractors to perform work upon the Bobsled Run until G-Lam has been compensated.

Inasmuch as the only contractual relationship found in this record is that between G-Lam and CEI, the liability of the federal defendant ostensibly is premised upon some theory of agency and/or third-party beneficiary. This conclusion follows from an evaluation of the substantive underpinnings of G-Lam's cross-claims. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14-16 (1951).

The federal defendant, however, urges several alternative grounds upon which summary judgment should be granted pursuant to Rule 12(b)(1) and (6) and Rule 56, Fed. R. Civ. Pro.

First, the federal defendant avers that it is a non-suable federal agency. Alternatively, if this Court should determine that these claims are asserted against the United States, it is argued that given the relief sought, the Tucker Act, 28 U.S.C. § 1346(a)(2) deprives this Court of subject matter jurisdiction.

In the first instance, it is important to acknowledge a cardinal principle which applies to the removal statutes. That is, it is established doctrine that a federal court's removal jurisdiction is "keyed" to, although not coterminous with, the original jurisdiction of the federal courts. See Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1972); Gully v. First National Bank in Meridian, 299 U.S. 109 (1936); Debevoise v. Rutland Railway Corp., 291 F.2d 379 (2d Cir.), cert. denied, 368 U.S. 876 (1961); 1A Moore's Federal Practice ¶¶ 0.157[5] and 0.160; 14 Wright & Miller, Federal Practice and Procedure §§ 3721-22.

This action, sounding in contract, may only lie against the federal defendant pursuant to particular statutory authorization. Or, in more specific terms, a federal court has no jurisdiction

over suits against the sovereign unless its consent is affirmatively provided by statute. Moreover, since the sovereign is generally immune from suit, absent such consent, a necessary corollary to this general principle is that only Congress may define the terms and conditions under which those actions may proceed against the sovereign. These limitations are to be strictly observed. Exceptions are not to be implied by the federal courts. Simply stated, the government's consent to be sued is jurisdictional; and, absent specific statutory authority, the federal courts are without power to hear the matter raised. See United States v. Sherwood, 312 U.S. 584 (1941); Gardner v. United States, 446 F.2d 1195 (2d Cir. 1971), cert. denied, 405 U.S. 1018 (1972); Grabbe v. Brownell, 247 F.2d 402 (2d Cir. 1957); Hammond v. United States, 388 F. Supp. 928 (E.D.N.Y. 1975).

In terms of the present litigation, the specific statutory authority for purposes of original jurisdiction is found in 28 U.S.C. § 1346(a)(2), which provides:

- (a) The district courts shall have original jurisdiction concurrent with the Court of Claims of:
- (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort

With this perspective, the resolution of the parties' contentions is greatly facilitated.

First, the federal defendant CSA, urges that there is no explicit statutory language authorizing it to be sued eo nomine. Blackmar v. Guerre, 342 U.S. 512, 515 (1952). To the contrary, in my judgment such explicit authorization is found in 42 U.S.C. § 2941(d)(3) (Supp. 1977), which provides:

No suit, action or other proceeding, and no cause of action, by or against the Office of Economic Opportunity [statutory predecessor to defendant CSA], or any action by any officer thereof acting in his official capacity, shall abate by reason of the enactment of the Headstart, Economic Opportunity and Community Partnership Act of 1974 (emphasis supplied).

See 42 U.S.C. § 2941(h) (4) (Supp. 1977).

And, for purposes of litigation under Section 1346(a) (2), an action may be brought against an independent federal agency as the titled defendant. Harlem River Produce Co. v. Aetna Casualty & Surety Co., 257 F. Supp. 160, 165 (S.D.N.Y. 1965). See Dugan v. Rank, 372 U.S. 609, 620 (1963); Ex Parte State of New York, 256 U.S. 490, 500 (1921).

G-Lam, for purposes of maintaining any litigation against the federal defendant in this Court, must overcome additional jurisdictional obstacles. At this point, it is appropriate to emphasize that the Tucker Act, is itself purely a jurisdictional statute.

[I]t does not create any substantive right enforceable against the United States for money damages [T]he Act merely confers jurisdiction upon it [Court of Claims] whenever the substantive right exists.
United States v. Testan, 424 U.S. 392, 398 (1976).

G-Lam's first jurisdictional obstacle is to demonstrate the existence of a claim "founded upon any express or implied contract with the United States." There must be an actual contract; and, although such contracts may be implied, they must be implied in fact and not based merely on equitable considerations and implied in law. United States v. Minnesota Mutual Investment Co., 271 U.S. 212 (1926); Alliance Assurance Co. v. United States, 252 F.2d 529 (2d Cir. 1958).

As previously noted, the only contractual relationship posited herein is that existing between G-Lam and CEI. G-Lam urges that it is a third-party beneficiary of the purported contractual relationship between CEI and the federal defendant CSA. In my judgment, not only is there an absence of support for such a proposition in the

case law; but, for this Court to find merit in such a contention, would be contrary to the settled principle that statutes waiving sovereign immunity are to be strictly construed. United States v. Sherwood, supra; Cohen v. United States, 195 F.2d 1019 (2d Cir. 1952).

In terms of the federal funding of local community or state agencies, therefore, I find the following language reasoned and applicable to this case:

Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well. It is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of "beneficiaries." United States v. Orleans, 425 U.S. 807, 816 (1976) (emphasis supplied).

The holding in Orleans is similarly persuasive for purposes of this litigation. The Court held that a community action agency funded under the Economic Opportunity Act of 1964 is not a federal agency or instrumentality for purposes of liability under the Federal Torts Claims Act. Similarly, in the matter before me, CEI ostensibly is a community action agency as contemplated by the Economic Opportunity Act, 42 U.S.C. § 2790(a); and, in my judgment, is not an agent of the United States for purposes of any contractual liability that may arise out of the construction of the Bobsled Run.

And, in similar factual circumstances, the United States Court of Claims rejected contentions by a plaintiff urging that (1) it was a third-party beneficiary of the contractual arrangements between a local housing authority and the Department of Housing and Urban Development; and (2) that the local authority was an agent for HUD. The Court held, in part that:

The contract here in issue is one of many pursuant to which the Federal government subsidizes projects of state and local authorities for the public betterment. The United States, however, does not make itself a party to the contract relating to said projects but obligates itself by separate agreements, as here, to local authorities

for the funding of those projects it approves. This does not create an express or implied contract between plaintiff and defendant nor does it make the Commission defendant's agent through HUD. Housing Corporation of America v. United States, 468 F.2d 922, 924 (Ct. Cl. 1972).

Upon the authority of these two cases, it is my judgment that G-Lam has failed to establish the existence of an express or implied contract between itself and the United States; consequently the first Count of G-Lam's cross-claim against the federal defendant must be dismissed for failure to state a claim upon which relief may be granted.

Apart from G-Lam's failure to establish the existence of an express or implied contract, there are more fundamental objections to the retention of G-Lam's cross-claims against the federal defendant. First, district courts under Section 1346(a)(2) may not entertain claims against the United States which exceed \$10,000.00. Such actions may only be asserted in the Court of Claims pursuant to 28 U.S.C. § 1491. Putnam Mills Corp. v. United States, 432 F.2d 553 (2d Cir. 1970); Ove Gustavsson Contracting Company, Inc. v. Floete, 278 F.2d 912 (2d Cir.), cert. denied, 364 U.S. 894 (1960). G-Lam seeks recovery for an amount in excess of \$127,000.00; therefore, even if G-Lam were able to establish the existence of a contract, this Court would not have subject matter jurisdiction.

Finally, it is established doctrine that the Tucker Act, 28 U.S.C. § 1346(a)(2), expressly made the jurisdiction of the district courts concurrent with that of the Court of Claims; consequently, only suits seeking money judgments are authorized. United States v. Testan, supra at 398; Lee v. Thornton, 420 U.S. 139, 140 (1975); Richardson v. Morris, 409 U.S. 464, 465-6 (1973); United States v. Sherwood, supra at 590-1. Therefore, G-Lam's request for declaratory and injunctive relief against the federal defendant in the second and third Counts of its cross-claims destroys this jurisdictional base in this District Court.

One further observation is warranted. That is, it is apparent that G-Lam is attempting to litigate a purported contract claim against the United States. Nevertheless, the success of such a claim appears to depend entirely upon G-Lam's success against CEI. For purposes of jurisdiction under the Tucker Act, however, litigation against these other parties, as a prerequisite to any liability against the United States, is impermissible and wholly inconsistent with the limited power of the district court or the Court of Claims. See United States v. Sherwood, supra at 588-91.

Remand

As a threshold matter, it is clear that there can be no remand regarding the federal defendant. A federal court's jurisdiction upon removal is said to be "derivative." The oft-quoted expression of this principle came from Justice Brandeis in Lambert Run Coal Company v. Baltimore & Ohio Railroad Company, 258 U.S. 377, 382 (1922):

As the state court was without jurisdiction over either the subject matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the federal court on removal is in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

Accord: Freeman v. Bee Machine Co., 319 U.S. 448 (1943).

In this proceeding, the removal, for purposes of the federal defendant, pertains to an action which arises under the exclusive jurisdiction of the federal courts; therefore, Lambert dictates that dismissal of the federal defendant is appropriate. See Lowe v. Trans World Airlines, Inc., 396 F. Supp. 9 (S.D.N.Y. 1975); 14 Wright & Miller, Federal Practice and Procedure § 3721 at pp. 521-24 (1976); 1A Moore's Federal Practice ¶ 0.169[1] at p. 555.

With the dismissal of the federal defendant, the basis and

support for removal to this federal Court has been eliminated. The question raised is whether this Court should now entertain the remainder of this litigation as properly cognizable in the penumbral area of judicial power -- ancillary or pendent jurisdiction. A related question, however, is whether "the case was removed improvidently and without jurisdiction." 28 U.S.C. §1447(c). See Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

The cross-claiming defendant, G-Lam, asserts that even if the basis of federal jurisdiction is eliminated from the case, this Court nevertheless has discretion to hear the remaining claims. See e.g. Watkins v. Grover, 508 F.2d 920 (9th Cir. 1974); Murphy v. Kodz, 351 F.2d 163 (9th Cir. 1965). See also United Mine Workers v. Gibbs, 383 U.S. 715, 725-27 (1966); Kavit v. A. L. Stamm & Co., 491 F.2d 1176, 1179-80 (2d Cir. 1974).

In my judgment, G-Lam's reliance upon those cases is misplaced because, in each instance, the removal was otherwise proper. See Wright, Law of Federal Courts § 41 at p. 166 (3d ed. 1976). That is, the removal was "keyed" to instances where the those courts had original jurisdiction in the first instance. Herein, by stark contrast, and as previously noted, the Court is without subject matter jurisdiction over G-Lam's cross-claim against the federal defendant.

Moreover, neither is there any other independent basis for removal by the remaining defendants. In this vein, G-Lam's contention of diversity of citizenship between the parties is questionable in the face of its counterclaim against the plaintiff Latona whose residence is identical to that of G-Lam -- New Jersey. See Strawbridge v. Curtiss, 3 Cranch (7 U.S.) 267 (1806); Rader v. Manufacturer's Casualty Insurance Co. of Philadelphia, Penn., 242 F.2d 419 (2d Cir. 1957). Additionally, it must be noted that even in the absence of Latona and the federal defendant, this action could not have been properly removed to this Court by the New York defendants

because 28 U.S.C. § 1441(b) does not afford this option to citizens sued in courts of their own state. Martin v. Snyder, 148 U.S. 663 (1893); Leinberger v. Webster, 66 F.R.D. 28 (S.D.N.Y. 1975). This same limitation would foreclose any removal to this Court pursuant to Section 1441(c).

So viewed, this Court's role in this situation becomes not so much discretionary as an obligatory one under 28 U.S.C. § 1447(c), whereby the district court is directed to remand cases which appear to have been "removed improvidently and without jurisdiction." It is my conclusion, therefore, that this litigation save for the dismissal of the federal defendant, should be remanded to the State court.

In any event, even if this were a matter appropriate for the exercise of discretion, the absence of any substantial commitment of federal judicial resources to the non-federal claims, and the fact that the parties will surely receive a more experienced reading of the applicable State law, warrants a remand to the State court as the proper course. See United Mine Workers v. Gibbs, supra at 725-27.

The Court has considered G-Lam's remaining contentions and finds each of them without merit. It is sufficient to note that the dominant theme expressed throughout by G-Lam is a desire to litigate all issues against the essential parties in one forum. In my judgment, this may be best achieved where the litigation started, in the courts of the State of New York.

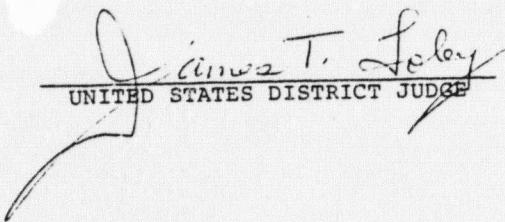
In sum, the motion of the U. S. Community Services Administration for summary judgment is hereby granted and judgment shall enter in its favor dismissing the cross-claims directed against it by defendant G-Lam. It is further ordered that the action is remanded to the Supreme Court of the State of New York, Essex County, pursuant to 28 U.S.C. § 1447(c). This disposition renders the

remaining outstanding motions filed in this Court moot, and all
are dismissed on that ground.

It is so Ordered.

Dated: September 7, 1977

Albany, New York


UNITED STATES DISTRICT JUDGE